

Licensees allege that the proposed 24 GHz DEMS allocation is “comparable” to the 18 GHz, DEMS allocation,³⁸ other petitioners have argued vigorously that DEMS Licensees in fact will reap an enormous spectrum “windfall” by virtue of the Commission’s action.³⁹ It is uncontroverted that the Commission has re-assigned 18 GHz DEMS licensees *four times more* spectrum than their current 18 GHz authorizations.⁴⁰ Although DIRECTV leaves it to others to argue the inequities of such a windfall, DIRECTV’s concern is not only that the Commission has taken broader action than is necessary to accommodate DEMS operations through an overbroad application of the military function exception, but also that such action will constrain available sharing options that might otherwise facilitate the ability of DEMS licensees to co-exist with FSS uplinks for BSS operations at 24 GHz in the event that this band is affirmed as the proper destination for relocated 18 GHz DEMS operations.⁴¹

Indeed, although the DEMS Licensees continually characterize the Commission’s 24 GHz allocation as comparable “replacement” spectrum,⁴² the evidence to date is that the Commission has changed fundamentally the nature and capacity of DEMS operations. WinStar Communications, for example, can scarcely contain its glee that an 18 GHz DEMS license it had acquired from LOCATE has been transformed into a “new-found spectrum asset” of

³⁸ DEMS Opposition at 28.

³⁹ Petition for Reconsideration of BellSouth Corporation (June 5, 1997), at 16; Petition for Reconsideration of the Millimeter wave Carrier Ass’n, (June 5, 1997), at 15-16; Petition for Reconsideration of Webcel Communications, Inc. (June 5, 1997), at 14.

⁴⁰ DEMS Opposition at 32.

⁴¹ For example, if DEMS was provided less spectrum at 24 GHz, there may not be a significant overlap with proposed BSS use of the spectrum at 24.75-25.25 GHz.

⁴² *Id.* at 34-35.

fundamentally different value by the Commission's actions in the DEMS Order.⁴³ WinStar notes that "[w]ith 40 MHz paired channels in the 24 GHz band, WinStar now has service opportunities *it never could consider* at 18 GHz," and asks the Commission to allow it the operational flexibility to "*tak[e] advantage of this unexpected opportunity.*"⁴⁴

In view of such candid statements by an 18 GHz licensee with little incentive to distort the truth, it is difficult to take at face value the statements of the DEMS Licensees that a quadrupling of spectrum is necessary to provide comparable service at 24 GHz. Interested parties have a right to receive additional technical information on proposed 24 GHz DEMS operations, and to submit their own responsive analyses. Contrary to legal precedent and the requirements of the APA, the Commission to date has⁴⁵ provided affected parties no opportunity or forum in which to do so.

III. DIRECTV UNQUESTIONABLY HAS STANDING TO CHALLENGE COMMISSION ACTIONS TAKEN IN THE DEMS ORDER

Finally, Teledesic and the DEMS Licensees also suggest that DIRECTV has no standing to challenge the actions that the Commission has taken in the DEMS Order. DIRECTV, it is argued, "cannot demonstrate any injury from the lack of public notice and comment," since DIRECTV has no "substantive rights" at issue in the relocation of DEMS to 24 GHz⁴⁵ and

⁴³ Petition for Clarification of WinStar Communications, Inc. (June 5, 1997), at 5.

⁴⁴ *Id.*

⁴⁵ Teledesic Opposition at 14; *see* DEMS Opposition at 22.

currently “holds no 18 GHz band or 24 GHz band authorizations.”⁴⁶ These claims simply are wrong.

The D.C. Circuit “has held unequivocally” that where, as here, a party “complains of an agency’s failure to provide notice and comment prior to acting, it is that failure which causes ‘injury’; and interested parties are ‘aggrieved’ by the order” embodying the challenged agency action.⁴⁷ Thus, interested parties, such as DIRECTV, need not establish “substantive rights” in the 18 GHz or 24 GHz bands, as the DEMS Licensees and Teledesic assert, to complain of the FCC’s abject failure here to follow required notice and comment procedures.

Moreover, on the merits, DIRECTV, perhaps more than any other petitioner in this proceeding, clearly meets constitutional and prudential standing requirements to challenge the substantive actions taken by the Commission in the DEMS Order. Indeed, the suggestion of the DEMS Licensees that DIRECTV expressed only a “mere hope or intention to apply” to use the 24 GHz band is puzzling⁴⁸ -- and clearly incorrect -- given that the band has been allocated internationally for BSS use for five years, and more importantly, that DIRECTV filed both a Petition for Rulemaking to allocate the 24.75-25.25 GHz band for FSS uplinks to BSS stations, and an application for a six-satellite BSS system to use these bands, on the same day that DIRECTV filed its Petition for Reconsideration of the DEMS Order.⁴⁹

⁴⁶ DEMS Opposition at 22.

⁴⁷ *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (citation omitted).

⁴⁸ DEMS Opposition at 24.

⁴⁹ See Petition of DIRECTV Enterprises, Inc. To Amend Parts 2, 25 and 100 of the Commission’s Rules to Allocate Spectrum for the Fixed-Satellite Service and the

If the DEMS Order remains unmodified, DIRECTV will face the prospect of serious interference constraints with relocated DEMS licensees, and in some areas, a possible inability to uplink its expansion system BSS signals at 24 GHz -- a consequence that would be traceable directly to the Commission's actions in the DEMS Order. Such circumstances plainly would pose "actual economic injury" sufficient to satisfy Article III "injury-in-fact" requirements,⁵⁰ and DIRECTV's status as an "actual or potential" 24 GHz spectrum applicant clearly would place DIRECTV within the prudential "zone of interests" protected by the Communications Act.⁵¹ DIRECTV clearly has standing to challenge the Commission's actions taken in the DEMS Order.

IV. CONCLUSION

For the reasons set forth in DIRECTV's Petition for Reconsideration and this Reply, the Commission should reconsider the actions taken in the DEMS Order, hold a notice

Broadcasting-Satellite Service, RM No. 9118 (June 5, 1997); Application of DIRECTV Enterprises, Inc. for Authority to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites (June 5, 1997).

⁵⁰ See *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 397 & n.13 (1987) (recognizing that alteration of competitive conditions has probable economic impact which satisfies "injury-in-fact" test); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (one "likely to be financially injured" by agency action has standing to challenge that action); *Coalition for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995) (inability to file applications to compete for larger unserved areas due to agency action constituted "actual economic injury sufficient to establish 'injury-in-fact'").

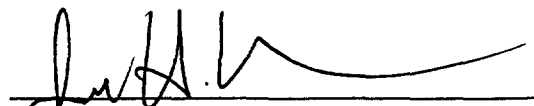
⁵¹ *JEM Broadcasting Co.*, 22 F.3d at 326 ("actual or potential license applicants" were "aggrieved" within meaning of 28 U.S.C. § 2344, and thus had standing to challenge FCC action); see also *Coalition for Effective Cellular Rules*, 53 F.3d at 1316 (interest in ensuring agency compliance with statutory licensing procedures "clearly falls" within zone of interests protected by the Communications Act necessary to establish standing to challenge FCC rules).

and comment proceeding, and modify the DEMS licenses accordingly after it has received comment from all interested parties. The deprivation of the opportunity for parties to comment on the DEMS relocation based on the APA exceptions that the Commission has invoked simply cannot be justified.

July 23, 1997

Respectfully submitted,

DIRECTV Enterprises, Inc.

A handwritten signature in black ink, appearing to read "Gary M. Epstein", is written over a horizontal line.

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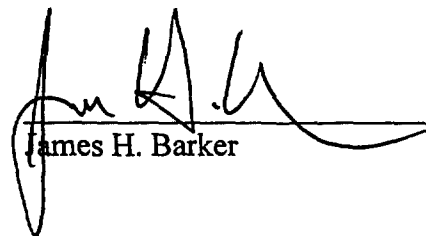
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